STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-142

April 14, 2000

CENTRAL MAINE POWER COMPANY
Petition to Establish Power Purchase Agreement Rate with UAH Hydro Kennebec

ORDER DENYING MOTION TO DISMISS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In this Order, we deny UAH-Hydro Kennebec Limited Partnership's (UAH) motion to dismiss the petition filed by Central Maine Power Company (CMP) in this proceeding.

II. BACKGROUND

On February 18, 2000, CMP filed a petition to establish the "Retail Rate" under its Purchase Power Agreement (PPA) with UAH. Specifically, CMP requests that the Commission: 1) find that the Retail Rate provision under the PPA has been rendered impossible to implement as a result of restructuring; 2) establish a proxy methodology for determining the Retail Rate; and 3) establish the Retail Rate for the period commencing March 1, 2000. On March 10, 2000, UAH filed a response to CMP's petition. On March 17, 2000, UAH filed a motion to dismiss CMP's petition with an accompanying memorandum of law. On March 31, 2000, CMP and the Public Advocate filed Memoranda in opposition to UAH's motion.

III. POSITIONS OF THE PARTIES

A. UAH

UAH's motion to dismiss is based on two arguments: 1) Maine law does not authorize CMP's petition; and 2) comprehensive federal regulation of qualifying facilities (QFs) preempts the Commission from modifying the PPA.

UAH argues that the Commission does not have authority to consider CMP's petition because the contract rates are tied to CMP's retail tariffs and as such, they are governed by unallocated section 6 of the Restructuring Act, P.L. 1997, ch. 316. This section, according to UAH, reserves solely to the QF the right to petition the Commission to establish rates for sale under PPAs tied to retail rates. UAH states that unallocated sections 6 through 9 of the Restructuring Act grant very different types of authority to the Commission regarding different types of QF contracts. Section 6 of the Act refers specifically to contracts tied to retail rates and, by its language, the Commission only has jurisdiction over such contracts when the QF seeks intervention.

Because it was CMP and not UAH that petitioned the Commission in this case, the Commission has no jurisdiction over this matter and must dismiss the petition.

Regarding federal preemption, UAH states that the Public Utility Regulatory Policies Act (PURPA) and Federal Energy Regulatory Commission (FERC) regulations establish a clear purpose and comprehensive federal system to encourage and regulate the development of QFs. Accordingly, any action of the Commission to modify the rates agreed to under a negotiated QF contract would frustrate this purpose and system, and thus be preempted by federal law. UAH relies on *Freehold Cogeneration Associates v. Board of Regulatory Commissioners,* 44 F.3d 1178 (3rd Cir. 1995) (*Freehold*), *Bates Fabric v. Maine Public Utilities Comm'n,* 447 A.2d 1211 (Me. 1982) (*Bates)*, and *Re: Complaint of Maine Public Service Company Regarding Power Purchase Agreement Between Itself and Wheelabrator-Sherman Energy Company,* Docket No. 94-301 (Jan. 19, 1995) (*MPS-Sherman*) for the proposition that the Commission is preempted from modifying the rates, resolving disputes, or otherwise affecting the validity of an existing contract. Any such action, according to UAH, would interfere with the comprehensive federal scheme to encourage the development and financing of QFs. Finally, UAH argues that any Commission action pursuant to CMP's petition would be directly contrary to the express provisions of federal regulations under PURPA, which exempts QFs from state law or regulation respecting the rates of electric utilities.

B. CMP

CMP opposes the UAH motion, stating that the Maine Legislature did not preclude Commission jurisdiction over the contract and that the Commission's ability to act on its petition is not preempted by PURPA. CMP argues that the Restructuring Act provides the Commission with authority over the current dispute. Although CMP acknowledges that unallocated section 6 may only be triggered by the QF, it states that unallocated section 8 applies more generally to provisions of any QF contract that may arguably be rendered impractical or impossible to perform as a result of restructuring.

According to CMP, the Commission is not preempted for two reasons. First, the Commission would not be altering the contract price terms by interpreting the meaning of the term "Retail Rate." Rather, the Commission would be resolving a contract dispute using general contract law which it may do consistent with *FERC v. Mississippi, 456 U.S. 742 (1982).* Second, PURPA does not preempt the Commission from setting rates in circumstances where the parties expressly agreed to a Commission-established rate. The rate that UAH is paid is established "pursuant to rates and tariffs approved by the Commission." PURPA does not preempt the Commission's basic authority to set rates to which parties to a QF contract have chose to tie their contract prices.

C. Public Advocate

The Public Advocate opposes UAH's motion to dismiss. The Public Advocate notes that the Joint Committee on Utilities and Energy recently voted unanimously to amend unallocated section 6 to, among other things, allow the utility to petition the Commission. Therefore, upon enactment by the full Legislature, the issue of Commission authority under State law becomes moot.

The Public Advocate argues that UAH's preemption argument fails for two reasons. First, the Commission is not being asked to revise the contract or impose new or different terms on the parties. Rather, the Commission is being asked to interpret the contract as written due to changes in the underlying premises resulting from restructuring. Second, by the terms of its contract, UAH has already submitted to significant Commission involvement. This occurs primarily because the "Retail Rate" referenced in the contract is a function of the rates set by the Commission.

III. DISCUSSION

A. Authority Under State Law

Subsequent to the filing of the memoranda, the Legislature enacted amendments to unallocated section 6.[1] Among these amendments, the Legislature explicitly stated that the utility, as well as the QF, may petition the Commission to act pursuant to the terms of section 6. This change makes it clear that the Legislature has authorized the Commission to act on CMP's petition in this proceeding. Accordingly, UAH's motion to dismiss on the grounds that the Commission does not have jurisdiction over the petition under State law is denied.

B. Federal Preemption

We conclude that the Commission is not preempted by PURPA and FERC regulations from acting on CMP's petition. At the outset, we note that federal preemption of state authority should not be presumed lightly. *Central Maine Power Company v. Town of Lebanon,* 571 A.2d 1189, 1191 (Me. 1990). Preemption may be found when no other conclusion is possible given the nature of the regulated subject matter or when Congress has clearly ordained such a result. *Dir. of Bureau of Labor Stds. V. Fort Halifax Packing Comp.,* 510 A.2d 1054, 1057 (Me. 1986).

We agree with UAH that PURPA does represent a comprehensive federal regulatory scheme intended to promote the development of QFs. However, it is clear that Congress intended to leave significant room for states to act in this area. *See, FERC v. Mississippi,* 456 U.S. 742, 750-51 (1982) (state commissions may issue

[1] The Governor has not yet signed the legislation. In the event the amendments to section 6 do not become law, we will reconsider the issue of the Commission's authority under State law.

regulations or resolve disputes regarding PURPA). In fact, PURPA contemplated extensive state involvement in implementing its provisions. A review of Maine's Small Power Production Act, 35-A M.R.S.A. §§ 3301-3309, and Chapter 36 of our rules as they existed prior to restructuring is evidence of such extensive state involvement. The issue, therefore, is whether unallocated section 6 in the context of Maine's Restructuring Act is contrary to the purposes of PURPA. We find that not only is section 6 consistent with the purposes of PURPA, but that the Restructuring Act was carefully crafted to assure that PURPA's policy of allowing for long-term QF contracts would not be disturbed by industry restructuring.

Unallocated sections 5 through 8 of the Restructuring Act were intended to ensure that QF contracts continued in effect throughout their terms despite the drastic restructuring of the industry. The sections recognize that such a significant change in the structure of the industry could call into question how certain provisions of QF contracts would operate after restructuring, and thus authorize the Commission to act in specific ways to maintain the benefits of the bargains of the contracting parties. This is precisely the purpose of unallocated section 6, which explicitly recognizes the potential problems in implementing contacts tied to retail rates after the generation component is unbundled from those rates.

We agree with CMP and the Public Advocate that CMP's petition pursuant to section 6 is not intended to change the contract rates or any other provision of the contract, but to implement the Legislature's policy that rights and benefits of parties to QF contracts be maintained after restructuring.

The cases cited by UAH do not support its position that CMP's petition should be dismissed. Both *Freehold and MPS-Sherman* stand for the proposition that a state commission is preempted by PURPA from altering the terms of a contract after it has been executed. As discussed above, CMP's petition does not seek to alter the terms of the contract, but rather requests that the Commission interpret the contract in the context of a dispute over what the term "Retail Rate" should mean after restructuring. Similarly, the holding in *Bates* is that neither the Congress nor the Maine Legislature had authorized the Commission to change the terms of an existing power purchase contract that predated PURPA. As explained above, the Commission authority under State law to consider the petition is now clear.

Finally, we reject UAH's argument that acting on CMP's petition violates the provision of federal law that prohibits states from regulating QFs as electric utilities. The consideration of the current contract dispute does not constitute regulation of the QF. As we stated in *MPS-Sherman*, QF contracts are not "super contracts" immune from all state interference; rather, such contracts are ordinary commercial transactions subject to general contract law. This includes State review of claims that certain

contractual provisions have been rendered impractical to perform, as asserted by CMP.[2]

Dated at Augusta, Maine, this 14th day of April, 2000.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

[2] In contrast to CMP's claim that the contract has been rendered impractical to perform, UAH asserts that there is no need to apply section 6 because the term "Retail Rate" does have meaning after restructuring. This disagreement is the essence of the dispute between the contracting parties that the Commission will resolve in the ongoing proceeding.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.